U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 10 August 2006

BALCA Case No: **2005-INA-00121**
ETA Case No.: P2002-CA-09537297/ML

In the Matter of:

GREG'S COLLISION CENTER, INC.,
Employer,

on behalf of

ALFONSO GARCIA-LOPEZ,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Leonard W. Stitz, Esquire
Santa Ana, California
For the Employer and the Alien

Before: **Vittone, Burke, and Chapman**
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

Greg's Collision Center (Employer) filed an application for permanent alien labor certification on April 19, 2001 on behalf of the above-named Alien for the position of Automobile Painter. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the

Code of Federal Regulations ("C.F.R.").[1] The U.S. Department of Labor Certifying Officer (CO) denied the labor certification application on two grounds: (1) failure to establish business necessity for a two-year experience requirement, and (2) failure to offer the prevailing wage for the position.

DISCUSSION

Business necessity for experience requirement

The labor certification regulations provide that an employer's job requirement is considered unduly restrictive if it exceeds the requirements stated in the *Dictionary of Occupational Titles* (DOT) or those normally required for the job in the U.S. 20 C.F.R. § 656.21(b)(2). An employer can retain a job requirement that exceeds those permitted by the DOT or those normally required for the job in the U.S. if it can establish business necessity for the requirement.

In the instant case, the Employer specified on the ETA 750A the job requirement of two years of experience in the offered job of automobile painter. (AF 12). The State Workforce Agency (SWA) processed the application using a job title and occupational code from the O*Net: Painters, Transportation Equipment, 51-9122. O*Net is the replacement for the DOT, which was last published in 1991. O*Net job title summaries include a "Job Zone" classification which shows, among other things, how much overall experience people need to do the work. "Job Zone Two" is designated for this job title. Job Zone Two has an SVP range of 4.0 to < 6.0. SVP (Specific Vocational Preparation) is a concept that dates from the DOT. An SVP of 4 translates to "Over 3 months up to and including 6 months." An SVP of 5 translates to "Over 6

[1] This application was filed prior to the effective date of amendments to the labor certification regulations published in 2004 popularly know as "PERM." *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). PERM substantially changed the labor certification process, but is not applicable to applications filed under the old regulations. Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted. In this decision, references to "pre-PERM" applications means applications that were filed prior to the effective date of the PERM regulations.

months up to and including 1 year." An SVP of 6 translates to "Over 1 year up to and including 2 years." *Dictionary of Occupational Titles* at 1009.

The SWA, interpreting Job Zone Two as permitting three months to one year of experience on a labor certification application, notified the Employer that its two year experience requirement was unduly restrictive and requested that it amend the ETA 750A or provide a business necessity justification. (AF 22). In response, the Employer challenged the SWA's interpretation of Job Zone Two, arguing that an SVP of 6 permits up to and including two years of experience. The Employer also argued that an automotive painter is traditionally considered a skilled occupation in the industry and that hiring painters with lesser experience would mean lowering its production standards. (AF 17).

After the application was transferred to the Federal CO, the CO issued a Notice of Finding (NOF) finding that the two year experience requirement was unduly restrictive for the same reasons stated by the SWA. (AF 7-10). The CO directed the Employer to either amend the requirement, or establish business necessity, or document that the requirement is usual in the occupation.

The Employer's rebuttal did not repeat the argument it made before the SWA that the Job Zone requirement had been misinterpreted, but rather argued that the requirement was justified by the duties of the job, which required a basic amount of knowledge. No documentation was provided to support this assertion. (AF 6).

The CO issued a Final Determination denying labor certification on the ground that, without documentation to support it business necessity argument, the rebuttal did not correct the excessive experience requirement. (AF 4).

The Employer's request for review (AF 1) and appellate briefs renew the argument that the CO misinterpreted the Job Zone/SVP requirements to only permit three to twelve months of experience.[2]

We need decide not whether Job Zone Two encompasses only three to twelve months of experience as argued by the CO and the SWA, or includes up to and including two years of experience as argued by the Employer, because Job Zone classifications are not applicable to pre-PERM labor certification applications. The applicable regulation at 656.21(b)(2) references the Dictionary of Occupational Titles and not the O*Net. We recognize that O*Net was in use for many purposes at the time that this application was being processed. However, we must interpret the regulations as written. The pre-PERM regulations were never amended to reference the O*Net in relation to what constitutes an unduly restrictive job requirement. Thus, we return to the DOT to analyze the Employer's job experience requirement.

The Board has long held that if a job requirement or job duty is one listed in the DOT, it is not considered unduly restrictive. *Lebanese Arak Corp*., 1987-INA-683 (Apr. 24, 1989) (en banc); *Garland Community Hospital*, 1989-INA-217 (June 29, 1991). The Board has also held that an employer may require the top end of an SVP range. *See Transgroup Services, Inc.*, 1988-INA-428 (Feb. 21, 1990).

The O*Net has a "cross-walk" feature that enables comparison of job titles between O*Net and the DOT. The equivalent DOT code for a Painter, Transportation Equipment is 845.381-014, which has a Specific Vocational Preparation Code of 6. An SVP of 6 permits an Employer in a pre-PERM labor certification application to specify an experience requirement of over one year up to and including two years. Since the Employer's two year experience requirement was within the SVP, the CO erroneously found that it was an unduly restrictive job requirement in violation of section 656.21(b)(2). Accordingly, the CO also erred in requiring the Employer to establish business necessity for its two year experience requirement.

[2] The Appellate Brief also includes some print-outs of documents from the Internet as evidence showing that two years of experience is normally required for the job in the U.S. Evidence not in the record upon which the denial was based, but first submitted with the employer's brief on appeal cannot be considered by BALCA on appeal. *O'Malley Glass & Millwork Co*., 1988-INA-49 (Mar. 13, 1989). Thus, we decline to consider this new evidence.

Failure to Offer Prevailing Wage

Having established that the Employer was permitted under the regulations to state a job requirement of two years of experience in the job offered, we turn to the question of whether the Employer failed to offer the prevailing wage for the job.

Under section 656.20(c)(2), an employer is required to offer a wage that equals or exceeds the prevailing wage determined under section 656.40. Where the employer is notified that its job offer is below the prevailing wage, but fails to either raise the wage to the prevailing wage or justify the lower wage it is offering, certification is properly denied. *Editions Erebouni*, 1990-INA-283 (Dec. 20, 1991).

In the instant case, the Employer offered a base wage of $16 per hour. (AF 12). The SWA Office determined that the prevailing wage was $23.33 based on an Occupational Employment Statistics (OES) survey, and requested that the Employer either amend the wage offer or state that it was not willing to make such an amendment. (AF 21). In response, the Employer argued that "despite the employer's requirement of 2 years of experience, the skill level for the position is that of Level I as the position requires the occupant to have only basic understanding of the occupation through experience. Furthermore, the position in question, requires a limited exercise of discretion and the occupant will work under close supervision receiving specific instructions from the manager." (AF 16).

After the application was transferred to the federal CO, the CO issued a Notice of Finding (NOF) finding that the Employer had failed to offer the prevailing wage. (AF 8-9).

In rebuttal, the Employer argued that the prevailing wage of $23.33 was for a Level Two position, and that Level Two only applies to a person with more than two years of experience. It argued "[i]n this case the employer clearly is not seeking someone with an excess of two (2) years experience, they require someone with entry level experience which is a maximum of two

(2) hears of experience." (AF 5). The Employer argued that $16.00 was the appropriate wage for the position offered, but did not provide any argument or evidence to explain how the $16.00 wage offer was set.

The CO's Final Determination rejected this rebuttal, pointing out the inconsistency between the Employer's arguments about why the two year experience requirement was not unduly restrictive and why a Level One prevailing wage should apply. (AF 4).

In its appellate brief, the Employer argues that "[t]he position is Level I in that it does not require over two years experience, it requires limited exercise of judgment and is supervised by a manager. Thus, the position does not rise to that of a Level II ... The prevailing wage Level I automobile painter is $11.19 per hour. The offered wage is $16.00 per hour. Thus, the offered wage exceeds the prevailing wage."

In *PPX Enterprises, Inc.*, 1988-INA-25 (May 31, 1989) (en banc), the Board ruled that "[a]n employer seeking to challenge a prevailing wage determination . . . bears the burden of establishing both that the CO's determination is in error and that the employer's wage offer is at or above the correct prevailing wage." Almost ten years after the decision in *PPX Enterprises*, the Employment and Training Administration issued General Administration Letter (GAL) 2-98, which introduced new procedures on how prevailing wage determinations were made and challenges thereto handled.[3] Most significantly, GAL 2-98 introduced primary reliance on the Bureau of Labor Statistic's Occupational Employment Statistics program for setting prevailing wages in a consistent and accurate way. Although a GAL is not a law, it describes how the regulations are implemented in day to day practice.[4] Thus, as a practical matter, former methods of setting prevailing wages were abandoned, and the OES survey became the starting point for all prevailing wage determinations.

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[3] In *El Rio Grande,* 1998-INA-133 (Feb. 4, 2000)(en banc) at n.6, the Board recognized that GAL 2-98 had, in effect, modified the requirement of BALCA case law that an employer both demonstrate a deficiency in the SESA wage survey and demonstrate the correctness of its own survey.

[4] Above we ruled that O*Net and Job Zones were not applicable to pre-PERM applications because the pre-PERM regulations explicitly referenced the DOT rather than the O*Net. GAL 2-98, in contrast, did not conflict with the regulations but merely stated the process by which the SWA and the CO would implement those regulations.

For purposes of the present appeal, the relevant part of GAL 2-98 is its description of how skill levels should be employed in setting prevailing wage determinations under OES wage surveys. Level I is stated as applying to beginning level employees. Level II is stated as applying to fully competent employees. GAL 2-98 does not say anything about using a two year and below standard for setting a wage as Level I or Level II.

The Employer cited no authority for its theory that Level I applies to any position that does not require over two years experience and we know of no such standard.[5]

More importantly, the Employer has stated a two year experience requirement for the position. Thus, even under its own theory, this would be a Level II position. The Employer's rebuttal and appellate brief are based on the position that the Employer is not seeking someone with an excess of two years of experience but only someone with entry level experience which is a maximum of two years of experience. But the Employer cannot have it both ways. It described the job as requiring two years of experience, which permits the Employer to only consider U.S. applicants with two or more years of experience. But it seeks to pay the worker selected for the job as though he or she had two years or less of experience.

Returning to what GAL 2-98 actually stated in regard to setting a wage as Level I or Level II, we conclude that the Employer in this case was seeking a fully competent worker when it set its minimum job requirement as two years of experience, which is the upper range of the SVP for the DOT position at issue. Although the Employer asserted that only basic knowledge was required for this position, with limited discretion and direct supervision from a supervisor, those assertions appear to have been self-serving, given its conflicting position on the unduly restrictive job requirement issue that it needed a skilled painter or else its productions standards would suffer. Accordingly, we find that there is no credible argument or evidence in this record to establish that the SWA and the CO improperly considered this to be a Level II position.

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[5] Indeed, on August 7, 2002 the Employment and Training Administration issued GAL 5-02 to clarify how Level I and Level II skill levels were to be determined for purposes of prevailing wage determinations. That document states that "[t]he amount of experience required for a job is relevant [as a factor in determining whether a job is Level I or Level II], but not necessarily determinative.... There is no fixed amount of experience that divides level I from level II."

Part of the Employer's burden under *PPX Enterprises, Inc.* was to establish that the CO's wage determination was in error. It has not done so. Accordingly, the CO properly denied labor certification based on the Employer's failure to offer the prevailing wage.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.